Supreme Court, U.S.
FILED
05-290 AUG 25 2005
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Tod N. Rockefeller
Petitioner,
v.
MICHAEL O. LEAVITT, in his official and individual capacities as Administrator, U.S. Environmental Protection Agency (EPA),
Respondent.

On Appeal to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

Tod N. Rockefeller, pro se
319 Sunnyview St.
Carlsbad, NM 88220
(505) 628 - 3541

Megan L. Rose, Ass't U.S. Attorney
U.S. Attorney's Office, Civil Division
555 4th St., N.W.
Washington, D.C. 20530
(202) 514 - 7220

END

Questions Presented

1. Whether the lower courts have both decided important federal questions in a way that conflicts with relevant decisions of this Court dealing with fairness and justice?

2. Whether this Court will protect the public reputation of proceedings of the Judicial Branch concerning a simple tort claim?

3. Whether this Court will demonstrate that the Constitution of the United States (U.S.) is indeed an enforceable law?

Parties Proceeding

Petitioner was plaintiff [03-1240 RBW] in the District of Columbia ("D.C.") district court (henceforth "Dist.Ct.") and subsequently Appellant (04-5290) to the U.S. Court of Appeals for the D.C. Circuit (henceforth "D.C. Cir.").

Table of Contents

Questions Presented	i
Parties to Proceeding	ii
Table of Authorities	iii, iv
Rules /Jurisdiction	iv
Constitutional Provisions at Issue	iv
Statement of the Case	1
Argument	1 thru 10
Appendix 1	A-1
Appendix 2	A-2 thru A-3
Appendix 3	A-4
Appendix 4	A-5 thru A-30
Appendix 5	A-31 thru A-42

Table of Authorities

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. I
U.S. Const., Amend. V
U.S. Const., Amend. VII

STATUTES

28 U.S.C. §§ 2671 et seq.
42 U.S.C. §§ 1983, 1985
42 U.S.C. §§ 6901 et seq.

CASES

Adikes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 *(1986)*
Associated Press v. United States, 326 U.S. 1, 5-7 (1945)
Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988)
Brady v. Maryland, 373 U.S. 83, 87 (1963)
Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400-03, 405 (1990)
Davis v. Passman, 442 U.S. 228, 234, 242 (1979)
Elkins v. United States, 364 U.S. 206, 222-23 (1960)
Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. *1996)*
Gray v. Poole, No. 01-7052, Sec. II (D.C. Cir. Jan. 8, 2002)
Koon v. United States, 518 U.S. 81, 100 (1996)
Kowal v. Dist. of Columbia, 17 F.3d 1271, 1278 (D.C. Cir. 1994)

Lytle v. Household Mfg., Inc., 494 U.S. 545, 554 (1990)
Mapp v. Ohio, 367 U.S. 643, 659 (1961)
Marbury v. Madison, 5 U.S. 137, 163, 180 (1803)
Montana v. Egelhoff, 518 U.S. 37, 42, 43 (1996)
Olmstead v. United States, 277 U.S. 438, 486 (1928)
Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 190 (1915)
United States v. Atkinson, 297 U.S. 157, 160 (1936)
United States v. B & O RR Co., 225 U.S. 306, 325 (1912)
United States v. Hasting, 461 U.S. 499, 526 (1983)
United States v. Olano, 507 U.S. 725, 732-33, 736 (1993)
United States v. Payner, 447 U.S. 727, 735 n.8 (1980)
United States v. Wright, 826 F.2d 938, 943 (10th Cir. 1987)
United States v. Young, 470 U.S. 1, 15 (1985)

Rules

Supreme Court ("S.Ct.") Rules 10(a), 10(c), & 14.1

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The D.C. Cir. denied Petitioner's Petition for Rehearing En Banc with an Order filed on JUN 18, 2005.

Constitutional Provisions at Issue

First Amendment Right of Free Speech
Fifth Amendment Right of Due Process of Law
Seventh Amendment Right of Trial by Jury

Statement of the Case

This case is solely an employment discrimination tort claim as categorized by the district court itself [see page A-21]. Petitioner had formerly worked for the U.S. Department of Energy ("DOE"). Employment discrimination by the DOE had been reported to Respondent, with a request for an investigation of such, and a public hearing, as 42 U.S.C. § 6971(e) requires.

Respondent refused to perform the nondiscretionary duties above, which waived his immunity, and had provided Petitioner with jurisdiction for his Complaint [03-1240] in Dist.Ct.. See 28 U.S.C. § 2680(a) and 42 U.S.C. § 6972(a)(2).

The Dist.Ct., and D.C. Cir. *en banc*, refused to acknowledge or address the facts and law above, which very clearly had provided Petitioner with jurisdiction for his case. There has most certainly been a miscarriage of justice towards Petitioner for which he seeks equitable relief. The only demand for action Petitioner makes, is for Respondent to negotiate with the DOE for Petitioner's reinstatement to a position other than his last duty station.

Argument

Question 1. The Dist.Ct. and D.C. Cir. have refused to follow a number of precedents, of this Court and the D.C. Cir. itself, related to fairness and justice. Said courts have clearly made erroneous claims in regard to the facts and applicable law to very clearly inflict prejudice, bias, ill-will, and injustice towards Petitioner.

It will become evident to this Court that Petitioner's claims in regard to the Federal Tort Claims Act ("FTCA"), the Constitution, 42 U.S.C. § 1983, and the untimeliness of Respondent were indeed very well-founded. All said claims were completely ignored by both lower courts.

The pleadings of Petitioner to the D.C. Cir. were:
1.) Motion for Summary Reversal ("Mot-f-Sum.Rev")
2.) Appellant's Reply to Appellee's Opposition to the Motion for Summary Reversal and Response to Appellee's Motion for Summary Affirmance, which had been attached to Appendix 5 below labeled as "Addendum II" (henceforth "Add. II");
3.) Petition for Rehearing by the Panel and Petition for Rehearing En Banc (included as Appendix 5 below) (henceforth "App.5").

FTCA

Notice - Enclosure I to Petitioner's Amended Complaint [03-1240] was titled: "Notice of Noncompliance & Petition for a Public Hearing . . ." (henceforth "Notice 1"). Notice 1 [dated April 18th, 2001] specifically made charges of "false statements" and "conspiracy", way back in 2001, which relate to the violation of Petitioner's rights under color of New Mexico State law by Respondent. See App.5 at A-35, A-36; see also doc 23 at 7-9; doc 24 at10.
Despite the repeated pleadings of Petitioner above, the Dis.Ct. claimed that:

> "For the first time in a supplemental response to the defendant's motion, the plaintiff cites New Mexico's perjury and conspiracy criminal statutes . . . as the basis for his FTCA claims."

See App.4 at A-23. The Dist.Ct. used its "first time" claim above to rule that Petitioner had not satisfied the FTCA's notice requirement before filing a civil suit in district court. See 28 U.S.C. § 2675(a).

Petitioner had also demonstrated that his 2001 Notice 1 [122 pages] had exceeded the D.C. Cir.'s own precedent with regard to adequate FTCA notice. See App.5 at A-36; see also Add. II at 8, 9. While citing precedents that a Dist.Ct. ". . . must

construe ' allegations and facts in the complaint in the ligh ost favorable to the plaintiff . . ." [App. 4 at A-9]; the Dist.Ct. here has done the opposite. As detailed *supra*, the Dist.Ct. made knowingly false representations in order to improperly dismiss Petitioner's Complaint [03-1240]. The Dist.Ct.'s dismissal conflicts with several precedents related to fairness and justice, and is an abuse of discretion delivering egregious injustice upon Petitioner. See all of the cases listed *supra* at iii, iv.

Liability - Petitioner had specifically detailed, within a total of seven (7) different pleadings to both lower courts, that Respondent had indeed waived his immunity and was liable under the FTCA. See App.5 at A-34, A-35; Add. II at 3; Mot-f-Sum.Rev. at 2 [4th Issue], 3, 4; doc 17 at 7, 9; doc 23 at 6-9; doc 24 at 6-8; doc 26 at 7 [¶ 8].

The FTCA specifies that if the Government fails to perform a nondiscretionary duty, its immunity is waived. 28 U.S.C. § 2680(a). It is undisputed material fact that Petitioner's 2001 Notice 1 had requested Respondent to investigate alleged discrimination Petitioner had experienced. Said discrimination was asserted to be a result of his Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq., administration prohibited by § 6971; and a required public hearing had also been requested. The RCRA requires that if Respondent receives requests as above:

> "The Administrator [Respondent] **shall** thereupon **investigate the matter** and, at the request of any party, **shall hold public hearings** . . . ."

See 42 U.S.C. § 6971(e); see also App.5 at A-35; Add. II at 3, 4; Mot-f-Sum.Rev. at 3-5; doc 26 at 7; doc 24 at 6-8; doc 23 at 6-7; doc 17 at 7-9.

Not only did the Dist.Ct. ignore the facts and law specifically outlined by Petitioner - again, and again, and again; but said court actually made a knowingly false representation concerning this case in regard to investigations. The Dist.Ct. claimed:

> ". . . the EPA's decision not to investigate a matter is a discretionary decision that is not subject to judicial review."

See App.4 at A-26. Compare the Dist.Ct.'s claim here to the requirements of § 6971(e) quoted above. Said court made an extremely obvious erroneous conclusion of law with a very clear demonstration of "impartiality, prejudice, bias [and] ill-will . . ." towards Petitioner to dismiss his case. See *Wright*, 826 F.2d at 943; see also the balance of cases listed *supra* at iii, iv. All of this most certainly is a departure "from the accepted and usual course of judicial proceedings, . . ." See S.Ct. Rule 10(a)

Constitutional Claim

If the abuses of discretion of the Dist.Ct., described above, were not enough to clearly demonstrate prejudice, bias, and ill-will against Petitioner, here is another example of such. Petitioner had outlined a very distinct violation of the equal protection component of the Fifth Amendment by Respondent. This is in regard to the employee protection clause of the RCRA [42 U.S.C. § 6971(e)] described *supra*. Petitioner had detailed his valid constitutional claim on six (6) occasions to the lower courts. See App.5 at A-35, A-37; Add. II at 10-12; Mot-f-Sum.Rev. at 9; doc 26 at 6, 7; doc 24 at 11, 12; and doc 23 at 10, 11.

There is absolutely no chance, because of the six (6) pleadings of Petitioner, that these facts and law presented were simply overlooked by both

lower courts in a series of honest errors. The prejudice and bias of the Dist.Ct. towards Petitioner again becomes very obvious when the method used to dismiss his constitutional claim is examined.

The Dist.Ct. claimed that the Constitution does not waive the Government's sovereign immunity in a suit for damages, citing a 5th Cir. case. See App.4 at A-26, A-27. Petitioner pointed out that the case cited by the Dist.Ct. "involved the lack of a "valid constitutional claim."" See Add. II at 10. Petitioner more thoroughly dispelled this claim of the Dist.Ct. with the citation of five (5) directly related case decisions of this Court. See Id at 11, 12. This pleading of Petitioner was completely ignored by the D.C. Cir.. See App.1 & App.2.

Both lower courts have made erroneous conclusions of law in abuse of their discretion. Said courts have refused to view the facts and law presented by Petitioner in the light most favorable. See *Atkinson*; *Beech Aircraft*; *B & O RR Co.*; *Cooter & Gell*; *Davis*; *Firestone*; *Gray*; *Koon*; *Olano*; *Wright*; and *Young* cases listed *supra*.

42 U.S.C. § 1983 Claim

Petitioner had clearly detailed, within his pleadings to both lower courts, that he had satisfied the D.C. Cir.'s own precedent for stating a § 1983 claim. E.g.: a violation of a right secured by the Constitution or laws of the U.S. was outlined, and the deprivation was committed under color of state law. See above; see also App.5 at A-37, A-38; Add. II at 12; doc 24 at 9-12; doc 23 at 9-11; and doc 17 at 13, 14.

Both lower courts have claimed that Petitioner had failed to state a claim under § 1983. See App.2 at A-3; App.4 at A-27, A-28. Said courts

have failed to evaluate this case "in light of the record viewed in its entirety. . . .", and have based their rulings on a clearly erroneous assessment of the evidence. See *Cooter & Gell*, 496 U.S. at 400, 405; see also *B & O RR Co.*; *Beech Aircraft Corp.*; *Firestone*; *Koon*; and *Wright* listed *supra* at iii, iv.

Untimeliness

Petitioner had specifically detailed, within doc 19, along with Certified Mail Return Receipts, that the Complaint [03-1240] was delivered to the U.S. Attorney's office on October 3rd, 2003. Respondent corroborated the October 3rd delivery with direct evidence [doc 20's "Exhibit A"] that said Complaint was received by the civil process clerk in the "Civil Division" of the U.S. Attorney's office on "October 3rd, 2003". See doc 24 at 5, 6.

It was explained to the Dist.Ct.[doc 19] that the response of Respondent, in the form of a Motion to Dismiss, dated December 5th, 2003, was on the 63rd day after service of the Complaint was perfected, so it was untimely (emphasis added). See Federal Rule of Civil Procedure 12(a)(3)(A).

Despite the direct and undisputable evidence that Petitioner presented, the Dist.Ct. had claimed:

> ". . . because service was not perfected, the court finds the motion to be timely. . . . the plaintiff had failed to properly perfect service upon the defendant."

See doc 22 at 4. This erroneous factual finding of the Dist.Ct. is despite the fact that Respondent admitted that service of the Complaint was indeed perfected on October 3rd, 2003. See doc 20 at 5. **The Dist.Ct. had robbed Petitioner of a fair jury trial (emphasis added).**

The Dist.Ct. has abused its discretion and has very clearly demonstrated prejudice, bias, and impartiality against Petitioner. See *Olano*, 507 U.S. at 732-33, 736; *Young*, 470 U.S. at 15; *Atkinson*, 297 U.S. at 160; and *Riverside*, 237 U.S. at 190.

The D.C. Cir. did not address whatsoever the issue of untimeliness outlined above. This is despite the fact that this issue was specifically presented to said court. Two of Petitioner's pleadings to the D.C. Cir. detailed the claim of Respondent's untimeliness. See M-f-Sum.Rev. at 8, 9; Add. II at 13, 14. The D.C. Cir. failed to address an essential point of law in regard to the appeal [04-5290], and has abused its discretion. See *Cooter & Gell*, 496 U.S. at 405; *Koon*, 518 U.S. at 100; *Beech Aircraft*, 488 U.S. at 172. **The D.C. Cir. has also robbed Petitioner of his right to a fair jury trial.**

This Court has held that it has a:

> " . . . longstanding commitment to preserving a litigant's right to a jury trial."

See *Lytle*, 494 U.S. at 554. For all of the justifications outlined *supra*, Petitioner prays that this Court grant this instant Petition to restore his Fifth and Seventh Amendment rights.

Question 2.. There is no policy of the U.S., or justification[s], for the treatment of Petitioner described above. This case is solely an employment discrimination tort claim. The only demand Petitioner makes upon Respondent, is for Respondent to negotiate with the DOE for Petitioner's reinstatement to a position other than his last duty station.

Petitioner is assuming that the public reputation of the proceedings of the Judicial Branch of the U.S. really is a concern of this Court today [as it was in the past]. This Court had once ruled that: